

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 TLX Incorporated,

10 Plaintiff,

11 v.

12 JetBlue Airways Corporation,

13 Defendant.
14

No. CV-19-04734-PHX-SMB

ORDER

15 Pending before the Court is Plaintiff TLX, Inc.’s (“TLX”) Motion for Order to Show
16 Cause RE: Contempt Against Accommodations Plus International (“API”). (Doc. 112.)
17 Intervenor and non-party API filed a Response, (Doc. 158), and TLX filed a Reply, (Doc.
18 162). The Court heard oral argument on February 10, 2022. After considering the
19 pleadings, arguments, and relevant law, the Court will deny Plaintiff’s Motion.

20 **I. BACKGROUND**

21 After initiating its lawsuit against JetBlue Airways Corp. (“JetBlue”), TLX sought
22 documents relevant to the litigation through API, a third-party company with which TLX
23 has previously litigated and entered into a settlement agreement. (Doc. 112 at 2.) TLX
24 issued a subpoena to API seeking such documents on October 5, 2020. (*Id.*) After API
25 eventually agreed to produce documents in response to the subpoena, TLX proposed search
26 terms that it believed would yield documents that API had produced previously in litigation
27 between the two parties. (*Id.* at 3.) TLX and API then agreed to limit the search terms
28 further in order to produce more relevant results. (*Id.*) The search terms produced 75

1 documents, but instead of producing all of them, API produced three emails. (*Id.*) After
2 the production, in response to inquiries from TLX, API admitted that it no longer had
3 certain servers that TLX requested to be searched. (*Id.* at 4.) API stated that it had “no
4 obligation to preserve the decommissioned servers.” (*Id.*)

5 However, API was able to locate the documents sought by TLX from API’s former
6 counsel, Gallagher & Kennedy. (Doc. 158 at 6.) Then, on January 21, 2022, well over two
7 months after TLX filed the instant motion, API produced 250 pages of emails that API
8 purportedly obtained from Gallagher & Kennedy that were disclosed in the previous
9 litigation between TLX and API. (Doc. 162 at 2.)

10 Despite API’s eventual compliance with the subpoena, TLX seeks a Court order
11 holding TLX in contempt, ordering API to turn over backup tapes of the servers to TLX
12 for additional searches, and to award TLX its attorney’s fees for being forced to bring these
13 issues before the Court. (Doc. 162 at 5.) At oral argument, API argued that it should not
14 be held in contempt and that the backup tapes do not exist.

15 II. ANALYSIS

16 Under Rule 45(g), a court “may hold in contempt a person who, having been served,
17 fails without adequate excuse to obey a subpoena or order related to it. Fed. R. Civ. P.
18 45(g). When considering contempt, “[t]he moving party has the burden of showing by
19 clear and convincing evidence that the contemnors violated a specific and definite order of
20 the court. The burden then shifts to the contemnors to demonstrate why they were unable
21 to comply.” *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting
22 *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n. 9 (9th Cir. 1992)).

23 API argues that Plaintiff cannot show that they violated the October 5, 2020
24 subpoena because, after the parties settled their litigation, API had no duty to preserve
25 documents related to that litigation. (Doc. 158 at 7.) Further, it argues that it did, in fact,
26 satisfy its obligation to respond to the subpoena. (Doc. 158 at 9.)

27 TLX continues to request that the Court hold API in contempt, arguing that before
28 filing the instant motion, TLX asked API if they had searched the backup tapes and servers

1 for relevant documents and API responded that that it no longer had the referenced servers.
2 (Doc. 162 at 3.) TLX argues that API misled it because it later located the backup tapes—
3 after TLX filed the instant motion—and produced relevant documents. (*Id.*) TLX also
4 argues that “[g]iven API’s continued litigation conduct and obstructionist tactics, the Court
5 should not believe API’s unverified, unsworn claims that it has located everything pertinent
6 to this dispute on its backup tapes.” (*Id.* at 5.) Thus, TLX requests that the Court order
7 API to produce the backup tapes so that TLX can conduct its own independent analysis.
8 (*Id.*)

9 “A duty to preserve information arises when a party knows or reasonably should
10 know that the information is relevant to pending or future litigation. *Pettit v. Smith*, 45 F.
11 Supp. 3d 1099, 1105 (D. Ariz. 2014). “[T]he general rule is that there is no duty to preserve
12 possible evidence for another party to aid that other party in some future legal action against
13 a third party.” *Id.* at 1006 (quoting *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir.
14 1990)); *Encompass Ins. Co. v. AMCO Ins. Co.*, No. CV-19-05198-PHX-DLR, 2020 WL
15 2395164, at *2 n. 2 (D. Ariz. May 12, 2020) (“the duty to preserve evidence applies to
16 litigants, not to non-parties”). Thus, third parties who are not involved in a case do not
17 typically have an obligation to preserve documents. Courts in this district have held third
18 parties responsible for failing to preserve documents, but those cases were limited to
19 specific scenarios where the third-party was not disinterested. *See id.* (finding that the
20 Arizona Department of Corrections was not a disinterested third party and had a duty to
21 preserve evidence when the State of Arizona was a defendant); *Woods v. Scissons*, No. CV-
22 17-08038-PCT-GMS, 2019 WL 3816727, at *4 (D. Ariz. Aug. 14, 2019) (finding that the
23 Prescott Police Department, as an agent of defendant City of Prescott, had a duty to
24 preserve evidence where it was not a disinterested third party). Thus, third parties who are
25 not a party of the litigation only have a duty to preserve evidence for litigation between
26 other parties in limited circumstances.

27 Here, API is nothing more than a disinterested third party with no duty to preserve
28 evidence for TLX or JetBlue. The situation here is much different than that in *Pettit* and

1 Woods where the third party was an agent of the governmental entity that was being sued.
2 API is a separate, distinct company from JetBlue, the defendant in the case. Although TLX
3 contends that API is trying to protect JetBlue, its longtime client, (*see* Doc. 112 at 5), these
4 mere contentions are not enough to show that API is disinterested. Accordingly, the Court
5 finds that API did not have a duty to preserve evidence as a non-party to this litigation.


6 API is not a party to this litigation and made diligent efforts to locate and search for
7 the documents requested by TLX. (Doc. 158 at 2–3.) Although API did not have an
8 obligation to preserve the requested documents, they later were able to produce the
9 requested documents by procuring the documents from API’s prior counsel. (Doc. 158 at
10 2–3.) Therefore, the Court declines to hold API in contempt. Additionally, considering
11 that API had to get the documents from prior counsel and there is no evidence that any
12 back up tapes still exist, the Court will not order API to turn over the back tapes for an
13 independent search by TLX.

14 **III. CONCLUSION**

15 Accordingly,

16 **IT IS ORDERED** denying Plaintiff’s Motion for Order to Show Cause RE:
17 Contempt Against API. (Doc. 112.)

18 Dated this 22nd day of February, 2022.

19
20
21 
22 Honorable Susan M. Brnovich
23 United States District Judge
24
25
26
27
28